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No. 71-931

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL., PETITIONERS

v.

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The purpose of this memorandum is to advise the Court that a supplemental opinion and statement on the denial of rehearing (Appendix, *infra*) were filed in this case by the court of appeals on March 2, 1972.

The supplemental opinion holds that Section 23 of the Federal-Aid Highway Act of 1968 (Pet. App. 215a-216a), by its direction that construction of the Three Sisters Bridge go forward "* * * notwithstanding any other provision of law * * *," relieves

the petitioners of any obligation to comply with various provisions of Title 7 of the D.C. Code. The supplemental opinion thus removes what respondents contended was an obstacle to this Court's consideration of the case (Respondents' Brief in Opp. p. 28). The supplemental opinion and statement on the denial of rehearing do not in any other respect, appear to us to have any significant effect on the issues presented in the pending petition for certiorari.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,838

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.,
APPELLANTS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

No. 24,843

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, APPELLANT

THE DISTRICT OF COLUMBIA, ET AL.
ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.,
APPELLANTS

SUPPLEMENTAL OPINION AND STATEMENT ON THE DENIAL OF A REHEARING BY THE DIVISION OF THE DECISION OF OCTOBER 12, 1971

Filed March 2, 1972

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and MACKINNON, *Circuit Judge*.

SUPPLEMENTAL OPINION

FAHY, *Senior Circuit Judge*, with whom BAZELON, *Chief Judge*, *concurs*: Our decision in *D.C. Federation of Civic Ass'ns v. Volpe*, —— U.S. App. D.C. ——, —— F.2d —— (1971), issued October 12, 1971, was rendered on appeal by the plaintiffs in the litigation from the decision of the District Court in *D.C. Federation of Civic Ass'ns v. Volpe*, 316 F. Supp. 754 (1970). In important respects we agreed with the findings of the District Court in that case that the Secretary of Transportation had not complied with certain applicable provisions of Title 23 of the United States Code. We could not agree, however, with the rulings of the District Court that the Secretary in other important respects had met the requirements of Title 23. We accordingly remanded the case with directions that construction of the bridge be enjoined until those requirements are met, as set forth in our opinion.

The plaintiffs had also contended in the District Court that the defendants were required and had failed to comply with statutory provisions other than Title 23, including certain provisions of the Code of the District of Columbia. In rejecting this contention the District Court held that the project had been exempted by Section 23 of the Federal-Aid Highway Act of 1968[1] from compliance with all statutory provisions "other than those of Title 23 of the U.S. Code." Plaintiffs-appellants renewed their contention in this court. Because the parties had not squarely faced this problem in their briefs before us when we rendered our October 12, 1971, decision, we asked for supplemental briefs, which have been filed. We now decide the questions thus reserved.

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[1] P.L. 90-495, 82 Stat. 815, 827-28 (1968)

I.

The relevant provisions of Title 7 of the D.C. Code are §§ 108, 109, 113 and 122, briefly described in an Appendix to this opinion.[2] We have concluded, as more fully to be explained, that further compliance with these provisions is not required insofar as they apply to the Three Sisters Bridge project.

Section 23 of the Federal-Aid Highway Act of 1968 was the legislative response to the administrative decision of certain District of Columbia officials to abandon the bridge project, and in response also to the decision of this court in *D.C. Federation of Civic Ass'ns v. Airis*, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968), requiring compliance with Title 7 of the D.C. Code, "particularly §§ 7-108 to 7-113." By Section 23, Congress directed that construction of the bridge go forward "notwithstanding any other provision of law or any court decision or administrative action to the contrary," subject, as we held in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970), to compliance with the applicable provision of Title 23 of the United States Code.[3] This court pointed out in

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[2] In our October 12, 1971, decision we stated in this connection, at footnote 62, as follows: "At issue are 16 U.S.C. §§ 1, 470; 33 U.S.C. §§ 401, 403, and 525; 49 U.S.C. § 1655 (1970), and various sections of title 7 of the District of Columbia Code."

[3] The relevant portion of Section 23 of the 1968 Act is as follows:

> Sec. 23. (a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secre-

its opinion in that case that "it was Congress' intention to countermand the District Government's 'administrative action' which had stopped further interstate construction," adding in a footnote: "Presumably, the 'court decision' language [of Section 23] refers to our decision in *Airis*, but the reference is mistaken since that decision was not to the contrary." This court thus construed Section 23 in essence as a direction to the local and federal authorities to continue with the bridge plans formulated prior to *Airis*; but the court did not pass upon the precise question now before us, whether Section 23 exempted the bridge project from further compliance with those provisions of Title 7 of the D.C. Code which had been before the court in *Airis*. That case was not to the contrary of the intent of Section 23 that the bridge should be built; but the local Code provisions which had been held in *Airis* to be applicable to the bridge project we think became inapplicable by the subsequent enactment of Section 23 to the extent that com-

tary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects.

(1) Three Sisters Bridge, I-266 (Section B1 to B2).

(2) Potomac River Freeway, I-266 (Section B2 to B4).

(3) Center Leg of the Inner Loop, I-95 (Section A6 to C4), terminating at New York Avenue.

(4) East Leg of the Inner Loop, I-295 (Section C1 to C4), terminating at Blaistsburg Road.

82 Stat. 827 (1968).

pliance with those provisions would conflict with the provisions of Section 23 that work on the bridge should commence within 30 days. The reasonable conclusion to draw now from the ambiguous situation presented seems to us to be that such compliance with those provisions as had not occurred by the end of the 30 day period does not constitute a condition to the approval or construction of the project. This does not preclude the authorities from taking advantage of any of the provisions which they might find to be desirable or useful in connection with the project.

II

We have not overlooked that appellants also invoke certain provisions of the D.C. Code other than those in Title 7, namely, D.C. Code §§ 1-1005(a), 1407(a)(7) and 8-115, also briefly described in the Appendix to this opinion. We did not include these provisions among those which our October 12, 1971, decision reserved for further consideration. *See* footnote 2, *supra*. Nevertheless, we consider them. The issue as to their applicability to the project had been presented to the court in *Airis*, although they did not surface in the opinion. We think they are also fairly included in the target of Section 23. Even were we to interpret the omission from the *Airis* opinion of any discussion of these provisions to mean that the court regarded them as applicable to the bridge project, we nevertheless think the impact of Section 23 upon these provisions is the same as we have construed its impact to be upon the Title 7 provisions, as above set forth. The language of Section 23, and its history and objective, persuade us that the overriding intention of Congress was also to exempt the project from the necessity of further compliance with these recommendatory and consultative provisions of the local Code.[4]

[4] We are of course not called upon to pass upon any provi-

Clearly one of the objectives of Congress was to have the bridge project go forward promptly. The "notwithstanding • • • any law • • • to the contrary" language, construed in light of this objective, and of the history of the project, bears a construction that the provisions of the D.C. Code now considered should not delay or bar the authorities from proceeding. As we explained, however, in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970), Congress did not intend that the bridge should go forward without complying with "all applicable provisions of Title 23 of the United States Code." Those provisions having been brought into Section 23 itself, were not to the contrary of Section 23.

III

We consider finally whether the appellees must comply with 16 U.S.C. §§ 470, 470f, which are part of the United States Code. Only Section 470f is really involved. It provides that in the case of a project such as the Three Sisters Bridge the head of the Federal Agency having direct or indirect jurisdiction, prior to the approval of the expenditure of any federal funds on the undertaking, shall take into account the effect of the undertaking on any site that is included in the National Register of historical sites, and shall afford the Advisory Council on Historic Preservation, established under Title 16, a reasonable opportunity to comment on the undertaking. This provision was not considered in *Airis* and it is not a local highway statute. It is a part of a national plan to protect historic sites. Section 23 of the 1968 Act was passed, as we understand its purpose, to free the bridge from further planning under the local statutes. We cannot say that Congress also intended to render inapplicable this federal law of general application affecting historic sites. The Sec-

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sions of law not invoked by appellants, whether local or otherwise.

retary of Transportation is a member of the Advisory Council on Historic Preservation created by 16 U.S.C. § 470. Accordingly, if he has not already done so since our decision in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970)—we understand he may already have done so—the Secretary is required to comply with Section 470f before final approval of the project, for areas affected by the bridge project are listed in the National Register.[5]

As to 33 U.S.C. §§ 401, 403 and 525, and 49 U.S.C. § 1655, referred to in footnote 1, *supra*, apparently appellants and appellees agree that the authorities have complied with these provisions. No issue with respect to them is raised on this appeal.

Judgment accordingly

[5] The 1968 correspondence to which Judge MacKinnon refers in this connection is inconclusive in its submission to the Advisory Council and in the Council's response.

APPENDIX

7 D.C. Code § 108 prohibits the construction of any highway in the District at a width of more than 160 feet.

D.C. Code §§ 7-109, 7-115 and 7-122 require that whenever the D.C. Government proposes a new highway plan, the plan must be the subject of a public hearing with notice given to the affected landowners. A map reflecting the plan shall be prepared and certified to the National Capital Planning Commission for modification and approval, followed by filing and recording with the District Surveyor.

D.C. Code § 1-1005(a) requires any agency of the District Government, when it plans a new highway project, to consult NCPC in an effort to conform agency plans with over-all NCPC planning for the National Capital.

D.C. Code § 8-115 authorizes Federal and District authorities administering U.S.-owned property to transfer jurisdiction over such properties, for purposes of administration and maintenance, among themselves, provided the recommendation of the NCPC is first secured and that all such transfers are reported to Congress.

D.C. Code § 1-1407(a)(7) requires the District to submit its plans for highway projects to WMTA for its review. (This provision repealed Dec. 9, 1969, P.L. 89-774, § 8(a)(1), 83 Stat. 322.)

16 U.S.C. § 470f, requires the Secretary of Transportation to give the Advisory Council on Historic Preservation a reasonable opportunity to comment on plans for an interstate highway project that will affect historic areas in the National Register.

MacKinnon, *Circuit Judge*, concurring specially and dissenting in part: I concur in the Supplemental Opinion of Judge Fahy except to the extent that it differs from my prior dissenting opinions in *D.C. Federation of Civic Associations* v. *Volpe*, 140 U.S.App.D.C. 162, 434 F.2d 436 (1970) and *D.C. Federation of Civic Associations* v. *Volpe*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 24838 & 24843, dissenting opinion filed 11/4/71), and to my views herein expressed.

Judge Fahy's opinion at pages 4-5 would have initially exempted the Three Sisters Bridge project from compliance with those provisions that would conflict with the provisions of section 23 of the Highway Act of 1968 so that work on the bridge could have commenced within thirty days. That date having passed he now concludes that compliance with those provisions as had not occurred by the end of the 30-day period does not constitute a condition to the approval or construction of the project. I would express our opinion more affirmatively. In my view the provisions of section 23 of the Highway Act of 1968 effectively eliminated the application of any provisions of the D.C. Code which would conflict with the construction schedule or plans referred to in the Act for—

> those routes already under construction . . . [and] all routes [to be constructed] on the interstate system within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. (82 Stat. 827)

The Congress clearly incorporated the 1968 District of Columbia Highway Estimate, and whatever it includes, into the law so that its plans, routes, specifications and schedules should be controlling.

Judge Fahy's opinion also concludes that pursuant to Title 16 U.S.C. § 470f, the Department of Transportation should be required to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the Three Sisters Bridge project insofar as it may affect any district, site, building, structure or object that is included in the National Register. Section 470f was enacted on October 15, 1966.[1] It provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470n of this title a reasonable opportunity to comment with regard to such undertaking. (80 Stat. 917)

This requires the head of any Federal agency having jurisdiction over the Three Sisters Bridge to take into account the effect of that project on any area or structure included in the National Register and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such project.

An exchange of correspondence included in the record below[2] reveals that the Department of Transportation, on

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[1] The Department of Transportation became a department of the United States, effective April 1, 1967. Exec. Order No. 11340, March 30, 1967, 32 FED. REG. 5453; 49 U.S.C.A. § 1651 note; Department of Transportation Act, Pub. L. 89-670, October 15, 1966, 80 Stat. 931.

[2] Letter dated Feb. 8, 1968 from Mr. Mackey to Dr.

its own initiative, made a presentation at the February 7, 1968 meeting of the Advisory Council of the District of Columbia highway program in general and the Three Sisters Bridge project in particular. In the follow-up correspondence to this presentation, the Council's comments on these projects were expressly solicited. I find in this correspondence ample demonstration that the effects of the project on sites included in the National Register were considered within the Department of Transportation, and that the Advisory Council on Historic Preservation was given a reasonable opportunity to comment thereon. I accordingly respectfully dissent from the suggestion that the Council be afforded an additional opportunity to comment.

ON DENIAL OF A REHEARING BY THE DIVISION OF THE DECISION OF OCTOBER 12, 1971

FAHY, *Senior Circuit Judge,* with whom BAZELON, *Chief Judge, concurs:* On December 2, 1971, an order was entered denying appellees' suggestion for a rehearing en banc of the decision of October 12, 1971, which had been rendered by a three-judge division of the court. On the same date the division, consisting of Chief Judge Bazelon, Circuit Judge MacKinnon and myself, also denied a rehearing. Judge MacKinnon who had dissented from the decision of October 12, 1971, would have granted a rehearing. Each of us reserved the right to file later a statement of reasons for our position as to the denial of rehearing. This I now do in brief form.

Stevens, Def.'s Ex. 21, App. II at 529A; two letters dated Feb. 9, 1968 from Dr. Stevens to Mr. Mackey, Pltf.'s Exs. 63 & 64, App. II at 389A & 390A; letter dated Feb. 14, 1968 from Mr. Mackey to Dr. Stevens, Def.'s Ex. 36.

I

By §§ 23(a) and (b) of the Federal-Aid Highway Act of 1968, to which reference has been made in the foregoing Supplemental Opinion, Congress provided among other things that the Secretary of Transportation and the District of Columbia should resume construction of the abandoned bridge project as soon as possible after enactment, the construction to be

> "carried out in accordance with all applicable provisions of title 23 of the United States Code."

Work was to commence not later than 30 days after enactment. Work did commence but was brought to a halt by the litigation which questioned whether the construction was being carried out "in accordance with all applicable provisions of title 23 of the United States Code." This court had held in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970), that the applicable provisions of Title 23 included those governing "both the planning and building" of the bridge. This interpretation of the intention of Congress created a conflict with the implications of the intention expressed in the 30-day clause. The difficulty was resolved of necessity by suspension of the work while the questions thus raised were settled. Obviously the substantive provisions of Title 23, involving, *inter alia*, vital decisions of the Secretary of Transportation, took precedence over the apparently inconsistent time provision. The project could not proceed in disregard of Title 23. Accordingly, our 1970 decision, next above cited, required a remand of the case to the District Court for an expedited hearing with respect to compliance with Title 23. The Government did not seek Supreme Court review of that decision, and it became the law of the case. The soundness of this court's remand was soon manifested by the further proceedings in the District Court which we reviewed in our decision of October 12, 1971. As the opinion

of the District Court on the remand revealed approval of the Bridge project had been given when the planning was incomplete and fell short of statutory requirements in important respects. Extant were questions even of structural feasibility, involving safety, as well as of final design and location of ramps and interchanges. Moreover, a finding that only the minimum acreage of parkland would be taken fell altogether short of the content necessary to meet the statutory requirement of minimum harm to parkland. Furthermore, the approved location of the bridge on the District of Columbia side of the river was 1500 feet off from the nearest location considered in the 1964 public location hearing. The District Court's opinion did not reveal a factual basis to support its conclusion that the approved location was so similar to that subject to the public hearing as to eliminate the need for a fresh location hearing.

The situation thus briefly outlined with respect to compliance with the applicable provisions of Title 23 called upon this court to hold that the approval given by the Secretary was, as a legal matter, not in conformity with the applicable statutes, and that the findings and conclusions of the District Court that they were, could not be accepted under the standards of judicial review applied in such a case by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-15 (1971).

It is well to keep in mind that Title 23 of the United States Code is a comprehensive congressional enactment governing the deep involvement of the federal government in the Interstate Highway System, of which the Three Sisters Bridge was to be a part. The provisions of the Title could hardly find a more appropriate place for careful application than in and about the Capital of the nation, especially if a proposed project encroaches upon parklands and historic sites, both subjects of express congressional solicitude. It therefore was quite natural, not-

withstanding the desire that the bridge project proceed promptly, for Congress also to require compliance with the applicable provisions of Title 23. It is equally well to note, as the Government points out, that in such a project the Secretary must be permitted to make decisions in what might be called a progressive manner—not everything can be pulled together all at once. But when decisions necessary to final approval are made, such as those required with respect to parklands by Section 138 of Title 23, they must be made conditionally and tentatively, subject to readjustment and reconsideration as the process toward final determination goes forward. And final approval must await and be dependent upon completion of this process.

In thus briefly supplementing our October 12, 1971, opinion, we refer to it in the respects there more fully stated as reasons for our denial of the motion for rehearing.

MacKINNON, *Circuit Judge*, dissenting: I dissent from the denial of rehearing of the decision of October 12, 1971 for the reasons expressed in my opinion in that case, filed November 4, 1971.

The majority opinion comments that prior decisions on certain issues have become "the law of the case." While that rule of judicial practice imposes some restriction upon the trial court it does not prohibit the appellate court in a proper case from reconsidering its decision.[1] Also what

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[1] Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 763-764 (5th Cir. 1963); Mayflower Hotel Stock P. Com. v. Mayflower Hotel Corp., 89 U.S.App.D.C. 171, 193 F.2d 666, 669 (1951); General American Life Ins. Co. v. Anderson, 156 F.2d 615, 618-619 (6th Cir. 1946); White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940); Chicago, St. P., M. & O. Ry. v. Kulp, 102 F.2d 352, 354 (8th Cir.), cert. denied, 307 U.S. 636 (1939); Reynolds Spring Co. v. L. A. Young Industries, 101 F.2d 257, 259 (6th Cir. 1939).

is the law of the case with respect to the Court of Appeals is not the Supreme Court's law of the case.[2]

However, I concur in the statement expressed at page 14 of the majority opinion that would allow Government agencies to make decisions conditionally and tentatively in a progressive manner. This conforms to the view expressed in my dissenting opinion filed November 4, 1971 in which I stated that I would permit work to proceed upon the *excavation* for the piers of the Three Sisters Bridge because Congress has approved the project, the necessary appropriations were available and the excavation is in the nature of a preliminary test since preconstruction borings are not conclusive.

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[2] White v. Higgins; *supra* note 1.

[3] Slip op. 15.